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to refuse to take cognizance of an offence on receipt of a complaint of facts constituting an offence, but he is rather bound to examine the complainant. He can then proceed to issue summons on the accused or to order an enquiry under s. 202, or to dismiss the complaint under s. 203. The use of the term "may take cognizance of any offence" does not make it optional with a Magistrate to hear the complainant. It refers rather to the action of a Magistrate in taking cognizance of an offence in either of these specified courses in which the facts, constituting an offence, may be brought to his notice. The case must be tried.

J. V. W.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

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July 29.

KEDAR NATH COONDOO CHOWDHRY (DEFENDANT No. 1) *v.* HEMANGINI DASSI (PLAINTIFF).*

Hindu law—Maintenance—Maintenance of mother on partition between her son and step-sons.

A widowed mother on a partition taking place between her son and her step-sons, of the property left by her husband, is not entitled to have the whole property charged with her maintenance, but only that portion of it which is allotted to her son on the partition.

A separation in food and worship took place between a Hindu widow, her son and her two stepsons, after which the widow lived as a member of her son's family, and was maintained by him. A partition of the moveable property having been made, a suit was brought by the son against the step-sons for partition of the immoveable property, and a decree was made defining the shares of the parties therein. That suit was brought and decreed pending a suit by the widow against her son and stepsons for maintenance from the date of the separation, and for fixing her future maintenance, in which suit she sought to have the maintenance charged on the whole estate left by her husband. *Held* that, from the separation to the decree in the partition suit, the widow was entitled to maintenance charged on the whole estate; and subsequently to the decree to a charge on her son's share only. But inasmuch as she had during the former period, been maintained by her son, and could not claim maintenance over again from her stepsons, whatever

* Appeals from Original Decrees No. 396 and 414 of 1885, against the decree of Baboo Bhuban Chunder Mookerji, Rai Bahadoor, Subordinate Judge of Hooghly, dated the 30th of March 1885.

claim her son might have against them for contribution for her maintenance during that time, the suit as against them must be dismissed.

Where the annual value of the whole estate was found to be Rs. 70,000, and the proportionate annual value of her son's portion was Rs. 23,333, Rs. 150 a month was held under the circumstances to be a suitable maintenance.

THE facts of this case are sufficiently stated in the judgment of the Court (PETHERAM, C.J., and GHOSE, J.)

Mr. *Woodroffe* and Baboo *Troilokya Nath Mitter* for the appellant.

Mr. *Evans*, Baboo *Guru Das Banerjee*, and Baboo *Karuna Sindhu Mukherji*, for the respondent.

These two appeals arise out of a suit brought by Sreemutty Hemangini Dassi, widow of the late Tara Churn Coondoo, for maintenance. The said Tara Churn Coondoo had two wives—Prosunnomoyi and Hemangini; the plaintiff Prosunnomoyi predeceased Tara Churn, and the latter died on the 8th Bysack 1272 (19th April 1865) having executed a will on the 5th Bysack 1272, and leaving Hurrish Chunder Coondoo, the defendant No. 2, his son by Hemangini, and two other sons, Kedar Nath, the defendant No. 1, and Annoda Pershad. The latter died in June 1882, leaving a will by which Kedar Nath, his whole brother, was appointed executor of his estate. So that Kedar Nath is the defendant in this suit, not only on his own behalf, but also as representing the estate left by Annoda Pershad.

The present suit as already mentioned is by Hemangini Dassi, the mother of Hurrish Chunder, the defendant No. 2, for maintenance, and it is a suit not only against her own son but also against her stepson Kedar Nath, and the legal representative of Annoda Pershad, the other stepson. It seeks to establish a charge for her maintenance against the whole estate left by her husband Tara Churn Coondoo. The plaint states that, on the 12th Falgoon 1290 (23rd February 1884) the family became separate, and since then the plaintiff has been obliged to provide herself with the expenses of her maintenance and the performance of religious ceremonies; that she served the defendants with a notice in respect to her claim for maintenance, and that the defendants not having complied with the requisition contained in the said notice, she has

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been compelled to bring the suit. And she prays that a sum of Rs. 500 per month be determined to be the proper allowance for her maintenance, and the expenses for religious ceremonies and pilgrimages, and that it be declared to be a charge upon the estate left by her husband. She also prays that Rs. 3,000, being the amount of her maintenance at the above rate since the date of the separation until the date of the institution of the suit, may also be decreed.

It appears that since the institution of this suit, which was on the 13th September 1884, and the filing of the written statement by Kedar Nath on the 6th December 1884, the plaintiff's son Hurrish Chunder instituted two suits for partition of the family estate; one was against Kedar Nath and the legal representative of Annoda Pershad, as also against Gooroo Dass Coondoo and others who are the cousins of Kedar Nath and Hurrish Chunder, and who represent a collateral branch of the family, in respect of the properties which then belonged jointly to both the branches of the family, and of which a six annas share belongs to Tara Churn's branch of the family; and the other suit was against Kedar Nath and the representative of Annoda Pershad, in respect to such properties as belonged exclusively to Tara Churn and his descendants; and it appears that one of the main grounds upon which the present suit was defended by Kedar Nath Coondoo was that, there having been already a separation in food and worship, as admitted by the plaintiff, and also by reason of the said partition suits then pending in Court, the plaintiff was not entitled to any decree for maintenance against him, but that her claim could only lie against her own son, and that the same could only be realized out of the share of the joint property which was to be allotted to her son upon the partition. The defendant also pleaded that, upon the terms of the will left by Tara Churn Coondoo, the suit could not be maintained, and that the plaintiff since the separation had been living in joint mess with her son, and all her expenses were being supplied by him; and that lastly the amount of maintenance claimed by her was too exorbitant. Hurrish Chunder Coondoo, the plaintiff's son, made no defence in the suit; and it would appear upon the conduct of the parties that it is a suit not really against her stepson

as also her own son, but her stepsons alone, and that had it not been for the suit for partition by her son which was then evidently contemplated, the present suit would not most likely have been instituted.

The Subordinate Judge has substantially found that the plaintiff's allegation that she was obliged to provide herself for her own maintenance since the separation is untrue, and that, as a matter of fact, she has been residing with her own son, who is prosecuting the case. He has accordingly disallowed her suit so far as back maintenance was concerned. He is, however, of opinion that the plaintiff's maintenance being a charge upon the whole estate left by Tara Churn, and the estate having not been actually partitioned, she is entitled to a declaration of her right to maintenance as against the entire estate; and being also of opinion that the terms of the will executed by Tara Churn do not preclude the plaintiff from maintaining this suit, and that Rs. 180 per month is a suitable allowance for her separate maintenance, ordinary *brotus*, extraordinary *brotus*, piousacts and pilgrimages, he has given a decree to the plaintiff declaring that the said amount is to be a charge upon the estate left by her husband now in the hands of the defendant No. 1 and the defendant No. 2, in the proportion of two-thirds and one-third share, that is to say, the defendant No. 1, Kedar Nath Coondoo, to pay Rs. 120 per month, and her own son, defendant No. 2, Rs. 60 per month.

It would appear from the evidence on oath given by Kedar Nath Coondoo in the cause that, at the time when the decree was passed by the Subordinate Judge, there had already been a division between the plaintiff's son and her stepson of the cash and Government securities, and it would further appear from the two judgments in the said partition suits and copy of the plaints in the said suits that were produced before us at the hearing, and which were received in evidence by the consent of both parties, that a decree has been passed on the 20th February of the present year determining in the suit of Hurrish Chunder against both the branches of the main family, the share of Hurrish Chunder to be 2 annas and of Kedar Nath and his nephews to be 4 annas out of the 6 annas share in properties belonging jointly to the whole

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family. The share of Hurrish Chunder in the separate properties of Tara Churn Coondoo's branch of the family has also been determined, we take it, upon the same principle, the judgment in the other suit having been referred to in the judgment which related to the exclusive properties of Tara Churn and his defendants, that is to say the share of Hurrish Chunder being one-third and that of Kedar Nath and his nephews being two-thirds. It would further appear from the above two judgments that the shares of the parties being defined, accounts have been ordered to be taken by the Commissioners, and partition made between the parties.

In this state of things the question that arises for consideration is, that in view of the said decree for partition, what is the relief which the plaintiff is entitled to in regard to her maintenance ?

This question, we may say, seems to be one almost of the first impression, there being no distinct text in the Hindu law-books nor any distinct authority upon the matter.

There can be no doubt that, under the Hindu law, the maintenance of a widow is a charge upon the inheritance, that is to say, upon the whole estate which, upon the death of the last owner, devolves upon his legal heirs, and in that view, so long as the estate left by Tara Churn Coondoo remained joint and undivided, there can also be no doubt that the plaintiff would be entitled to claim her maintenance out of the whole estate held by the defendants. But then the question is, what would be the rights of the plaintiff, and the true position of the parties, if there be a partition as between the plaintiff's son on one hand and her stepsons on the other hand ? No doubt, as matters at present stand, there has not been a complete partition between the parties, but it is clear at the same time that their shares have been ascertained and defined, and as a matter of fact there has been a partial division of the properties, which have the effect in law of making the plaintiff's son Hurrish Chunder a separate member of the family and entitled to a separate and defined share of the family property.

It was contended by the learned counsel for the plaintiff that the rights and liabilities of the parties were to be determined

and regulated by facts as they existed at the time when the suit was brought, and not as they occurred subsequent thereto ; and that the question raised by the defendant in this case should be left to be determined in the partition suit in which the mother was one of the defendants. But we cannot accept this view of the matter. We think we cannot shut our eyes to the fact which appears upon the record, and upon the two judgments adverted to above, *viz.*, that there has been a definition of the shares of the plaintiff's son and of the defendants, and also a partial partition in accordance with such shares ; and it therefore seems to us that we are called upon in this suit to make such a decree as would be consistent with the true state of the family as it exists at present. The parties to the suit are governed by the Bengal school of law, and we have to determine what, under the law as it is administered in Bengal, the true rights of the plaintiff are in respect to the maintenance claimed by her.

The rights of a Hindu widow as a widow arise out of the marriage, and upon the death of her husband, in the event of there being no sons, she succeeds, under particular texts, to the estate left by her husband. Where the husband leaves a son or sons, all that she is entitled to is maintenance out of the estate. When during the lifetime of her husband there is a partition of the family property, she gets if she is sonless, but not if she has a son, (in which case her son alone is entitled to a share) an equal share with the sons of her husband ; but where there is no such partition during the lifetime of her husband, what she is entitled to get, when the estate, upon her husband's death, passes to the sons, whether she has a son or sons born of her, or not, is only maintenance out of the estate. And when the Hindu law prescribes a share being allotted to a woman after her husband's death, upon a partition amongst her sons, it is a share which is given to her simply in lieu of maintenance, and not because she is a coparcenor in the estate, or that she has any pre-existing rights, and the share which is thus given to her reverts upon her death to those heirs of her husband out of whose portion the said share was taken (see Shama Churn's Vyvasta Darpana, Edition 1883, pp. 488, 521-522, and the authorities quoted

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therein; Strange's Hindu Law, Edition 1830, Vol II, p. 307, and *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1).

The question that then arises is, what may be her rights upon a partition taking place between the sons? In the case of many sons of one individual by different mothers, where the number of sons is equal, the partition, according to certain texts, may be made by them by allotment of shares to the mother, that is to say, there being no difference in the son's shares, each of the mothers takes a share for her sons. If, however, the sons are unequal in number, then a division, with reference to their mothers, cannot be made, and in that event the partition is made with reference to the number of sons themselves (see Dyabhaga, Ch. III, Sec. I, V. 12 and 13; Vyvasta Darpana, pp. 461-463, and the texts quoted therein.) When the partition is made between the different groups of sons born of different mothers, their mothers, whether they be their own mothers or step-mothers, get no share whatsoever, and this is apparently upon the principle that they are not the natural mothers of all the sons (see Vyvasta Darpana, 518, and the authorities cited therein, and Col. Dig., Vol. 3, pp. 98-102). When subsequently, each group of sons come to a partition among themselves it is then that their respective mothers get a share, but a mother having no son, or only one son, gets no share at all, but simply maintenance. If, however, at the time of partition with half brothers, the uterine brothers also come to a partition amongst themselves, their mother would be entitled to a share out of her own son's shares (see Vyvasta Darpana, pp. 518 and 519; Dyabhaga, Ch. III, Sec. 2, V. 29 and 30; *Joymonee Dassee* v. *Attaram Ghose* and *Seebchunder Bose* v. *Gooroopersaud Bose* (2). In the case of the number of sons by different mothers being equal, the partition, as already observed, may take place with reference to the mothers, the principle evidently being that each of the mothers and her sons become by the separation and partition the members of a distinct and separate family, holding as it were in common the share which is allotted to them; likewise in the case of a partition, where the number of sons is unequal, and where

(1) 9 W. R., 62.

(2) Macnaghten's Cons. of H. L, pp. 64-72.

the separation is between the several groups of sons, each of the groups becomes one joint family, and their mothers become members of their respective families, and continue to be so until there is a separation and partition among her sons. This seems to be almost the universal practice in Bengal, and no instance, as far as we are aware, has occurred where, notwithstanding such a separation and partition, a mother has claimed her maintenance against her stepsons. Having become a member of her own son's family, she would naturally look to her sons, and not to her stepsons, for her maintenance, and indeed that was the view that was thrown out by Sir Francis Macnaghten so early as the year 1824 (see pp. 42, and 59 of his book; as also Strange's Hindu Law, Vol. II, pp. 291 and 309); and this seems to be but consistent with the Hindu Law; for, in the event of a partition taking place amongst her own sons, she gets a share out of her sons' shares, and not out of her stepsons' shares. In this view of the matter the mother can only claim maintenance in her sons' family, whether she has only one son or more sons than one; the only difference being that in the latter case, upon a partition amongst the sons, she gets a share in lieu of her maintenance, whereas in the former case, there being no partition possible, she cannot possibly get a share but must be content with a maintenance. In the case of *Joymonee Dassee* already referred to, it will be found upon an examination thereof, that upon a partition between Laskhi Priya's son Atmaram, and his three half brothers, it was understood and admitted, and it was accordingly declared that his mother Lakshi Priya was not entitled to any separate property but was to look to her son for her maintenance. It is indeed true that Lakshi Priya, the mother, was at the time of the suit not subject to the jurisdiction of the Supreme Court which dealt with the case, and as such the above declaration was not binding upon her, but we do not refer to the said declaration as a precedent in this case, but simply as showing what so late back as in December 1823 was fully understood to be the true position of a mother situate as the present plaintiff is.

So long as there is no partition between the several groups of sons, a mother has indeed the security of the whole estate left by her husband for her maintenance, and this is just and proper,

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because, so long as the estate remains joint, she is not in a position to predicate which particular share of the family property is to be charged for her maintenance; but the moment such a partition takes place, she is in a position to predicate it, because the share which is eventually to come to her in lieu of maintenance, when such a share does come to her by the act of her own sons, is to come out of her sons' share of the family property; so that it is but consistent with reason, equity and justice that, upon the partition taking place, her maintenance is to attach to that share of the estate which is allotted to her sons. By the separation and partition she becomes a member of her sons' family, and it would not seem to be reasonable that she should be allowed to claim maintenance against another family of which her stepsons become members; and, indeed, if she could claim such a right, the partition itself would be but an imperfect one.

It was argued before us that the same principle which governs the rights of a sonless widow, ought to govern the case of a widow who may have a son or sons, that is to say, whereas a sonless widow gets no share but only maintenance which is to come out of the whole estate, so in the case of a mother having a son or sons, a decree should be made charging the whole estate, or charging any particular portion of the estate which may be adequate for her maintenance. But it appears to us that the case of a sonless step-mother is very different indeed from the case of a mother having son or sons, because upon a separation and partition taking place, the step-mother does not become the member of any particular family, but she continues, as it were, a member of all the families into which the original family is divided; and she is therefore not in a position to predicate which particular share of the family property ought to provide for her maintenance. In the present case, it seems clear that the plaintiff upon a separation and partition between her son and stepsons does become, and has in fact become, as substantially found by the Sub-Judge, a member of her son's family; and she is in a position to predicate which of the shares of the family property determined by the partition ought to provide for her support.

Upon all these considerations it seems to us that up to the time of the decree for partition defining the separate shares of the members

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of the family, the plaintiff would be entitled to claim her maintenance against the whole estate, and subsequent thereto against the share allotted to her son. But then it appears that since the separation in 1290 she has been maintained in the family of her son, and as such cannot justly claim maintenance over again from her stepsons, or the share which now belongs to them. Possibly, her son could claim contribution from her stepsons for the money spent by him for her maintenance, but that is not the matter now before us. The result, therefore, is that so far as her stepsons are concerned, this suit must fail.

The plaintiff's son has preferred no appeal against the decree passed by the lower Court, and inasmuch as her maintenance is to come out of the share which has devolved upon him, and also because it is optional with her either to remain in joint mess with her son or not, it becomes necessary to determine what may be a suitable allowance for her. Mr. Strange, in his book on Hindu law, see Vol. I, p. 171, observes as follows: "It," meaning maintenance, "may be supplied by assignment of land or an allowance of money, in either case proportioned to her support, and that of those dependent upon her, including the performance of charities, and the discharge of religious obligations; and this always with reference to the amount of the property so as at the utmost (as has been said) not to exceed a son's or other parcener's share. In whatever way the provision is made, care should be taken to have it secured. The manner of doing this is discretionary, there being no special law directing how provision is to be made." See also Shama Churn's Vyvasta Darpana, p. 152, and cases quoted in Vol. II, pp. 359-361 and 368. In view of the principles enunciated above, and bearing also in mind that the performances of religious ceremonies, acts of piety; and pilgrimages, are for the benefit of the soul of her departed husband, and also for her own spiritual benefit, we think that without following the details which have been adopted by the Subordinate Judge, and without expressing any opinion as to the necessity or otherwise of performing any particular religious ceremonies, or undertaking any particular pilgrimages, we think that, regard being had to the social position of the family, and the annual value of the entire estate which has been found to be Rs. 70,000, and to the

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proportionate annual value of her son's portion of the estate, *viz.*, Rs. 23,333 or thereabouts, that Rs. 150 a month is a suitable allowance for her, and this she will be entitled to receive from the time when she may separate from her son.

We therefore direct that the decree of the lower Court be set aside; the suit, so far as the defendant No. 1 and the representatives of Annoda Pershad are concerned, be dismissed; the plaintiff's claim for back maintenance be also dismissed, but that a declaratory relief be granted to her as expressed above, as against the share of the estate left by Tara Churn Coondoo now in the hands of her son, the defendant No. 2.

As regards the costs, we think that the defendant No 1 is entitled to his costs both in this and the lower Court and as against him the suit is dismissed with costs.

J. V. W. *Decree varied.*

Before Mr. Justice Prinsep and Mr. Justice Beverley.

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June 22.

RAKHAL CHUNDER BOSE AND OTHERS (PETITIONERS) *v.* DWARKA NATH MISSER (DECREE-HOLDER) AND KALLY DASS MISSER (AUCTION-PURCHASER) AND OTHERS (JUDGMENT-DEBTORS)*

Civil Procedure Code, s. 311—*Application to set aside sale*—*"Person whose property has been sold"*—*Mortgagee*—*Transfer of Property Act* (*IV of* 1882), *ss.* 86, 87.

The mortgagees of a certain tenure obtained, on 11th September 1884 under s. 86 of the Transfer of Property Act, a decree for foreclosure, which declared that, on failure to pay the amount found due, the mortgagor's right of redemption should be barred on 11th March 1885; this time was subsequently extended on the application of the mortgagor to 30th April 1885. On the 6th April 1885, in execution of a decree for arrears of rent obtained by the superior holder of the tenure against the mortgagor, the tenure was sold free from incumbrances. The mortgagees applied under s. 311 of the Civil Procedure Code to have the sale set aside for material irregularity. *Held*, that, under s. 86 of the Transfer of Property Act, the mortgagees had such an interest in the property as brought them within the words of s. 311, "person whose property has been sold," and entitled them to make the application.

IN this case the judgment appealed from was as follows:—

* Appeal from Order No. 298 of 1885, against the order of Baboo Kanti Chunder Bhaduri, Munsiff of Satkhira in Khoolnah, dated the 5th of September 1885.